

STATE OF CALIFORNIA

Energy Resources Conservation  
And Development Commission

In the Matter of:	)	Docket No. 00-AFC-14
	)	
Application for Certification	)	STAFF'S 2 <sup>nd</sup> PREHEARING
of the EL SEGUNDO POWER	)	CONFERENCE STATEMENT
REDEVELOPMENT PROJECT	)	and RELATED SCHEDULE
	)	
_____	)	

In accordance with the “*Notice of 2<sup>nd</sup> Prehearing Conference and Evidentiary Hearings*” issued on December 12, 2002 by the assigned Committee in this matter (Commissioner Robert Pernell, Presiding, and Commissioner William Keese), the Energy Commission Staff hereby tenders its “*2<sup>nd</sup> Prehearing Conference Statement and Related Schedule*” for the next phase of this siting case proceeding.

**I. 2<sup>nd</sup> PREHEARING CONFERENCE STATEMENT**

**A. Overall Status Of Issues Between The Parties**

Staff is pleased to report that since the 1<sup>st</sup> Prehearing Conference was held on November 7, 2002, there has been substantial progress in resolving and/or narrowing the remaining issues of dispute between the parties in this proceeding. We specifically note that: (1) previously disputed conditions concerning **Noise** and **Visual Resources** Impacts appear to have been resolved to the satisfaction of all parties at this time; and (2) disputed issues in the subject areas of **Air Quality**, **Biological Resources**, **Land Use**, **Socioeconomic Resources**, **Facility Design** and **General Conditions** have been significantly narrowed and/or clarified between the parties. (See the “Second Set of Agreed-to-Conditions of Certification,” and the related Table of “Conditions Not Yet Agreed To”, which Staff docketed in this matter on December 31, 2002.)

**B. Specific Status of Issues Between Staff and the Applicant**

The only subject areas which are not fully resolved between the Staff and the Applicant at this time are **Air Quality**, **Biological Resources** and **General Conditions** (i.e. one general condition concerning the start date for construction).

(1) With regard to **Air Quality**, Staff still needs specific data from the Applicant and/or SCAQMD concerning ERC certificate numbers and ERC quantities, before finalizing its

condition on residual PM10 and SO<sub>2</sub> emissions. This issue should be fully resolved between the Applicant and Staff once that data is provided.

(2) **General Condition COM-15** in the Final Staff Assessment currently requires, among other things, that the Applicant “Establish Pre-Construction Milestones To Enable Start of Construction *Within One Year of Certification*.” (p. 7-10, emphasis added). As explained in the accompanying text of the FSA, “the use of [SCAQMD] Priority Reserve emission reduction credits would require the applicant to be fully and legally operational within three years of the Commission’s final decision.” Given the anticipated four to six months needed for demolition of Units 1 and 2, and the minimum 20 months needed thereafter for construction of the new units, Staff regarded the one-year “start of construction” deadline as reasonable to ensure that the Applicant would be able to meet the three-year “start of operation” deadline in SCAQMD’s Rule 1309.1 (concerning use of Priority Reserve credits). In addition, Staff remains concerned about a potential generation shortfall in California in the 2005-2008 timeframe, and considers it important to ensure, where possible, that projects permitted by the Energy Commission are built in a timely manner.

The Applicant has objected to the “one-year start of construction” requirement, raising legal and practical concerns. After reviewing this issue, Staff hereby offers to modify its Construction Milestone in **General Condition COM-15** to read as follows:

ESTABLISH PRE-CONSTRUCTION AND CONSTRUCTION MILESTONES  
TO ENABLE COMPLETION OF CONSTRUCTION IN COMPLIANCE WITH  
SCAQMD’S 3 YEAR “START OF OPERATION” REQUIREMENTS,  
CURRENTLY CONTAINED IN RULE 1309.1

[**Note:** The four “Pre-Construction” and eight “Construction” Milestones in the FSA would be consolidated under the modified heading above into a single list of 12 milestones.]

If this proposed modification is acceptable to the Applicant, then this **General Condition** issue will be fully resolved.

(3) With regard to the subject area of **Biological Resources**, a constructive workshop was held on December 18, 2002, to review and discuss the four new proposed Conditions of Certification which the Applicant recently put forward in this proceeding. At the workshop, the Applicant explained each of the four conditions in detail, and answered related questions for the first time from numerous participants who are concerned about the biological impacts of this proposed project (including the Staff, the National Marine Fisheries Service, the California Department of Fish and Game, the California Coastal Commission, the U.S. Coast Guard, the “Santa Monica Bay Keepers” organization, the “Heal The Bay” organization, and various residents of the area including Mr. Bill Eisen, Mr. Nick Nickelson and Mr. Bob Perkins).

As a result of the workshop, it is apparent that there are substantial problems, concerns and/or inadequacies with each of the four biology conditions proposed by the Applicant. Among other deficiencies, the proposed conditions fail to stabilize the existing environmental “baseline”

conditions at the site or to address serious monthly “seasonality” impacts related to biological entrainment and impingement impacts from the proposed project. In addition, the proposed conditions do not “restore and enhance to the extent feasible” damage to the marine environment that the project will cause, as required by the California Coastal Act, nor has any reliable scientific information been provided to achieve that end. Accordingly, the Staff cannot accept or recommend for adoption *any* of the Biology Conditions as currently proposed by the Applicant, and the issue of Biological Resources will need to be litigated as matters now stand.

## **II. PROCEDURAL ISSUES and REMAINING SCHEDULE FOR THIS PROCEEDING.**

While much has been accomplished in this siting case in recent weeks, there are several important procedures that must be undertaken before this matter will be ready for any meaningful and productive evidentiary hearings. These pre-hearing procedural matters include the following:

### **A. Recent Areas Of Agreement Must Have Clear Pre-Evidentiary Hearing Support**

Over recent months, a number of agreements have been reached among the parties concerning various issues, including **Noise** and **Visual Resources** impacts. While the “agreed-upon-conditions” have been prepared and docketed, the Applicant, the Staff and the Intervenor need to “true-up” their proposed written testimony in support of these conditions, so that there will be no misunderstandings at the hearings regarding the basis for these agreements, and so that agreed upon conditions can be legally stipulated to at the time of the evidentiary hearings.

### **B. Disputed Issues Must Be Clearly Presented In Writing Prior To The Evidentiary Hearings**

There are several issue areas that remain in dispute amongst the parties at this time. However, the nature of the proposed project and related disputes has apparently changed significantly since the filing of the FSA in September 2002.

Thus, for example, in its “Status Report” filed on December 9, 2002, the Applicant now states with regard to Biological Resources that “ESP II is preparing additional information for the Committee regarding [the flow caps] and other [biological] conditions” the Applicant recently proposed, and this information “should be submitted prior to the Staff workshop on December 18.” However, to date no additional written information has been presented on this proposal by the Applicant, and Staff is neither certain nor clear as to what exactly the Applicant is now proposing, and why the Applicant believes that its revised proposals (whatever they may be) will fully address its obligations under CEQA, LORS Compliance, etc. (For example, is the Applicant proposing to “amend its proposed project” to include flow cap restrictions, or is the Applicant instead proposing to “mitigate any significant project impacts” by providing “offsetting” flow cap restrictions? What exactly is the timing, amount and nature of the flow cap restrictions which the Applicant is proposing, and what biological importance, if any, does the Applicant assert for these proposed flow caps?)

It is important for the “ball to come to rest” on all disputed issues prior to the evidentiary hearings in this matter for several reasons. First, this should not be a “trial by surprise or

ambush”, i.e. all parties should be provided with a clear description of exactly what the Applicant is or is not proposing for this project, and why the Applicant believes that any recently revised proposal(s) will satisfy the requirements of the law. Second, once the proposed project is fully and accurately updated by the Applicant, the Applicant is also entitled to know the nature of any remaining concerns which the Staff and other Intervenors may have. Finally, and perhaps most importantly, the Committee is entitled to demand (as a matter of administrative efficiency) that the parties make all reasonable efforts to resolve disputed issues *before* the evidentiary hearing, and to require a clear and well organized presentation of any unresolved issues that still remain.

#### C. Staff’s Requested Schedule For The Next Phase Of This Proceeding

Because the recent “areas of agreement” need written explanations and updated confirmation prior to the evidentiary hearings, and because the “areas of disagreement” need to be clarified and “brought to rest” before the hearings as well, Staff requests that prior to the start of evidentiary hearings in this proceeding (1) the Applicant and Intervenors be directed to prepare and file their final written testimony; (2) all parties be allowed a reasonable opportunity to review and file any written rebuttal testimony; and (3) thereafter, all parties be allowed a reasonable opportunity to prepare their witnesses for the actual evidentiary hearings.

Staff specifically requests the following Schedule for the next phase of this proceeding:

- 1. Final Applicant and Intervenor Written Testimony** – to be filed no less than 21 days after the Prehearing Conference (i.e. no sooner than January 28, 2003, if so ordered on January 7<sup>th</sup>);
- 2. Final Written Rebuttal Testimony from All Parties** – to be filed no less than 21 days after the filing of Written Testimony (i.e. no sooner than February 18, 2003, if so ordered on January 7<sup>th</sup>); and
- 3. Start of Evidentiary Hearings** – To commence no sooner than 14 days after filing of Rebuttal Testimony (i.e. March 4, 2003).

Staff’s requested schedule will insure that all parties are given a fair opportunity to prepare for the evidentiary hearings, will maximize the possibility of pre-hearing dispute resolution, and will ensure that the hearings themselves can be conducted in an efficient and clearly focused manner. In addition, the proposed “Start of Evidentiary Hearings” is only five weeks beyond the “tentative hearing dates” the Committee initially mentioned in its 1<sup>st</sup> Prehearing Conference Order.

#### D. Other Procedural Matters

Staff also submits the following information to the Committee:

1. With the Committee’s approval, for all undisputed topics Staff is prepared to submit its testimony solely in writing as contained in the FSA and relevant Errata;

2. At the present time, there are two topic areas which remain unresolved between the Applicant and Staff at this time (Biological Resources and Air Quality), and each of these topic areas will require adjudication and the presentation of witnesses unless fully resolved prior to the evidentiary hearings. While reserving the right to identify and call additional witnesses, at this time Staff can identify at least the following witnesses which it intends to call at the hearings on the topics that remain in dispute:

*(a) Biological Resources and Cooling Water Alternatives* – Dr. Noel Davis, Dr. Mike Foster, Dr. Pete Raimondi, Dr. Gregory Caillet, Mr. Richard York and Mr. James Schoonmaker. Staff may also call witnesses [as yet unidentified] representing the California Coastal Commission, the California Department of Fish and Game, the National Marine Fisheries Service, and others concerned with the biological welfare of Santa Monica Bay. These witnesses will testify concerning: (1) the significant adverse biological impacts of the project as currently proposed; (2) the failure of the proposed project to comply with applicable LORS concerning protection of biological resources; and (3) the nature and feasibility of using reclaimed wastewater as a cooling water alternative that would completely eliminate the significant adverse biological impacts and LORS concerns of the project as now proposed.

*(b) Air Quality* – Mr. Joseph Loyer. This witness will testify concerning the significant adverse air quality impacts of certain residual PM10 and SO2 emissions from the proposed project for which the Applicant has not yet identified complete offsets. The witness will also testify concerning the feasibility of obtaining mitigation for these significant adverse air quality impacts.

3. Staff is the only party in this case to date to have identified its formal written testimony (i.e. the FSA and Errata). Without the opportunity to review the other parties' proposed testimony, Staff is unable to determine the extent and nature of any legal issues or its need to cross-examine witnesses of other parties at this time. However, at a minimum Staff anticipates lengthy cross-examination of each of the individuals identified in the "List of Preparers" on page 74 of the "Supporting Impact Analysis of Entrainment and Impingement," which the Applicant docketed on December 28, 2001 in this proceeding. In addition, Staff anticipates the need for detailed cross-examination of all witnesses supporting the Applicant's current claims of "infeasibility" regarding (a) the use of reclaimed wastewater as a cooling alternative to eliminate the significant adverse biological impacts of the project; and (b) the obtaining of "offsets" to mitigate for the adverse impacts of residual PM10 and SO2 emissions from the proposed project.

January 3, 2003

Respectfully Submitted

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